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June 21, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
OMD, Room 222, Stop Code 1170
1919 M Street, N.W.
Washington, D.C. 20554

RE: MM Docket No. 92-266

Dear Ms. Searcy:

The law firm of Baraff, Koerner, Olender & Hochberg, on behalf of its cable television clients herewith submits an original and eleven (11) copies of its Petition for Reconsideration and Clarification in MM Docket 92-266.

If there are any questions about the enclosed, please feel free to contact the undersigned.

Sincerely,

Mark J. Palchick

MJP:btc:clnt\searcy.621

Enclosures

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation		

PETITION FOR RECONSIDERATION AND CLARIFICATION

Baraff, Koerner, Olender & Hochberg, P.C.

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& HOCHBERG, P.C.
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June 21, 1993

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation		

PETITION FOR RECONSIDERATION AND CLARIFICATION

Baraff, Koerner, Olender & Hochberg, P.C. (BKOH), on behalf of its below-listed cable television clients[1] pursuant to Section 1.429 of the Commission's rules,

[redacted]

BKOH urges the Commission to reconsider its position so where franchise authority agrees, after adoption of the Rate Order, not to regulate rates in return for valuable consideration that benefits the subscribers to the system, they may be bound by that agreement. BKOH concedes that an agreement not to regulate rates (1) cannot be conditioned on some alternative form of rate regulation and (2) the franchise authority must have the right to seek rate certification if the terms of the agreement are not met by the cable operator. However, with these two safeguards in place, the enforceability of such agreements not to regulate rates would be consistent not only with the literal language of the 92 Cable Act[2] but would also be in the public interest.

Two of the five policy statements of the 92 Cable Act are:

> (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;
> (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in the receipt of cable service;[3]

Section 623 of the 92 Cable Act at (a) (1) permits regulation of basic rates only under the conditions set

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[2]. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("92 Cable Act").

[3]. 92 Cable Act at Section 2. (b) (3) (4).

forth in section 623. Pursuant to section 623 a franchising authority may, but is not required to, regulate basic rates. A franchise authority that seeks to regulate basic rates can only do so if it files a written certification with the Commission. The Commission can only regulate the rates for basic service where the Commission disapproves a franchising authority's certification or revokes the franchising authority's right to regulate basic rates. [4] The Commission cannot, absent a certification request, regulate basic rates. The Commission, at paragraph 54 of the Rate Order, expressed a great reluctance to override a locality's decision not to regulate rates because of Congress' desire to "vest in local franchising authorities the primary authority to regulate basic rates."[5] While BKOH does not dispute the Commission's decision at paragraph 61 of the Rate Order that franchise agreements adopted prior to the 92 Cable Act that prohibited rate regulation were preempted, it does not agree that agreements entered into after the Rate Order are either preempted or unenforceable.

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[4]. Section 623 (a) (6) of 92 Cable Act.

[5]. The only exception the Commission enunciated to its reluctance to regulate rates where a local authority has not certified was where the local authority wished to regulate rates but did not have the financial or legal ability to do so. In that instance, the Commission found that if the local authority sought certification FCC or city would have to assume jurisdiction over basic rates anyways. This is entirely different from the situation where the local authority voluntarily, with full knowledge of its rights under the 92 Cable Act, decides that the policies of Section 2 (b) (3) and (4) would be better served by regulatory forbearance.

Clearly regulation of basic rates can only be imposed pursuant to Section 623 of the 92 Cable Act, and even then such regulation must be consistent with the express intent of the statute. Therefore, it is significant that Section 2 (b) (4) does not mandate rate regulation where cable systems are not subject to effective competition. To the contrary, the stated intent of the Act is to "ensure that consumers interests are protected in the receipt of cable service." Therefore, where a franchise authority determines, with full knowledge of its rights under the 92 Cable Act and after opportunity for public comment, that the interests of consumers are better protected by a decision not to regulate basic rates in exchange for other consumer benefits, that decision should not be preempted by the Commission. Examples of situations in which a local franchising authority can legitimately decide to agree not to regulate basic rates include: where the cable operator is willing to construct previously unprofitable areas of the franchise; where the cable operator is willing to accelerate rebuilding and updating the system; and where the local authority determines that it can use the franchise fees that would be diverted to the cost of regulation in a manner that better protects its consumers. While these are just a very few of the instances where franchising authorities could prudently elect not to regulate rates they do represent legitimate and national consumer protective elections. However, in order

for consumers to be fully protected it is necessary that the Commission find that not only can the franchising authority elect not basic to regulate rates[6], but that where such election is pursuant to an agreement with the cable operator that is also in the public interest, such agreement is legally and/or equitably enforceable against both the cable operator and the franchising authority.

II. WITHDRAWAL OF RATE CERTIFICATION

A necessary corollary of allowing a franchise authority to elect not to regulate rates is to permit the franchise authority to determine, in the face of operational experience, that basic rate regulation does not protect consumer interests and allow it to withdraw its certification to regulate basic rates. However, as it is presently written, the Rate Order would appear not to allow a franchising authority the right to withdraw its certification. As the rules are presently written, a certification can be denied or revoked by the Commission with the result that regulation of basic rates would default to the FCC. However, there does not appear to be a mechanism whereby a franchise authority could withdraw its certification with the consequence that there would no longer be regulation of basic rates. It would appear

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[6]. As it did in paragraphs 51-54 of the Rate Order.

axiomatic that since the 92 Cable Act clearly allows a franchising authority the right not to regulate rates, that the same franchising authority should also be permitted to discontinue the regulation of basic rates after an initial certification.

III. TREATMENT OF TAXES FOR NON CORPORATE ENTITIES

Part III of form 393 recognizes that an essential element of the cost of equipment and the provision of service is the taxes paid by the operator on the equipment and services. However, by limiting the recognition of taxes only to the taxes paid by the operator, the Commission has inadvertently ignored the existence of business entities other than class C corporations. For partnerships (both limited and general), S corporations and sole proprietorships the taxes are not technically paid by the operator but flow through to the ultimate owners. These taxes are still a legitimate cost of providing the equipment or service but under a strict reading of part III of form 393, they would appear not to be recognized for other than operators that are corporations. Accordingly, it is respectfully requested that the Commission clarify that such taxes should be recognized on part III of form 393 even if the operator is not owned by a corporation.

IV. NOT ALL EQUIPMENT COSTS SHOULD BE SUBJECT TO REGULATION

The Commission implies throughout the Rate Order that all rates for equipment offered by a cable operator should be subject to regulation. This is neither consistent with the 92 Cable Act nor in the public's best interest.

First, where there exists a competitive marketplace for similar equipment within the franchising area there should be no regulation of such equipment by the cable operator. Section 2(b)(2) of the 92 Cable Act states explicitly that it is Congress' intent to rely on the marketplace, to the maximum extent feasible. In many franchise areas vendors other than cable operator currently offer for sale converters, remote controls, and other television interface equipment. While this may not be true for all forms of equipment, it is most certainly true in most markets for non-addressable converters. For example, in the city of Fairmont, Minnesota,[7] K-Mart and an independent retailer known as Bill's Radio offer products which are the functional equivalent of the Oak Sigma 500 converters offered by the cable operator. A subscriber has the option to either lease an Oak Sigma 500 converter from the cable operator or purchase similar equipment from one of these two retailers. Since there is clearly competition for the

[7] See Statement of Rick Plunkett attached hereto as Attachment 1.

provision of this type of equipment, the rates for this equipment should not be regulated by the FCC.

If the FCC insists on regulating equipment charges when there are competitive alternatives available, the Commission may artificially destroy a market where one exists. That is, if the Commission forces a cable operator to offer such equipment on a regulated and highly structured basis it may very well prevent the formation of competitive outlets for such equipment because the regulated price offered by the cable operator would be artificially low.

Moreover, by allowing free market conditions to exist where there are competitive alternatives for the sale or lease of television interface equipment, the Commission will fulfill another goal of the 92 Cable Act: that is, that competitive marketplaces for equipment be fostered and developed.

Second, Work Sheet 1, Part II, of Form 393 appears to require that all equipment revenues be included in the calculation of the permitted per channel rate. To the extent that these revenues include receipts from solely unregulated services, the Commission is not acting in the public interest. If a converter is not needed to receive any regulated level of service and an operator does not provide a converter to any regulated customer, but does lease converters solely to per channel or per view subscribers, inclusion of those revenues on Work Sheet 1,

Line 104, artificially inflates the cost per channel that the regulated service subscribers must pay. Accordingly, for the purposes of Line 104, these revenues, which are received solely in conjunction with the receipt of unregulated services, should be excluded.

Third, where equipment rental is bundled with the charge for unregulated services the Commission should not regulate the implicit charge for such equipment. Section 623(a)(1) is quite clear in its prohibition against any rate regulation unless such rate regulation is enforced pursuant to Section 623 of the 92 Cable Act. Section 623 explicitly prohibits either a franchising authority or the FCC from regulating the cost of per channel or per view services. Accordingly, a customer that chooses to subscribe to such service does so outside of the rate enforcement capabilities of either the Commission or the franchising authority. Therefore, the Commission and the franchising authority are statutorily prohibited from implying an equipment rate for per channel or per service channels and thereby attempting to regulate the cost of such equipment.

V. ADDITIONAL REQUESTS FOR CLARIFICATION

In addition to the above, BKOH respectfully requests clarification on the following points.

(a) Some operators provide an off-season maintenance charge as a convenience to seasonal subscribers. This allows subscribers to avoid having to reconnect at the beginning of each season. It is unclear from the Rate Order and from the Instructions contained with Form 393 how these revenues should be treated.

(b) Form 393 as presently drafted would appear to permit an operator to include provisions for equipment or services not presently offered. However, for purposes of establishing permitted rate, the form relies entirely on historical data. We respectfully request that the Commission clarify that an operator may use anticipated prospective costs where it anticipates offering equipment or services upon adoption of the 393 form submitted to the franchise authority.

(c) The Rate Order is exceedingly vague as to the regulation of bulk agreements. While the Rate Order explicitly anticipates that bulk agreements may be in the public interest, it provides no guidelines for franchise authorities to ascertain whether such bulk agreements are consistent with the FCC's rate standards. Clearly, in most instances, the rates offered for bulk accounts will be less per subscriber than the permitted rates for individual residential use. As such, so long as there is a legitimate basis for offering a bulk agreement, such bulk agreement

92 Cable Act, provided that the per subscriber cost is less than the individual residential cost. In any event, the Commission should grandfather all existing bulk agreements. These agreements were entered into at arms-length between business entities and, absent violation of some other law, should be permitted to remain.

VI. CONCLUSION

In summary, for the reasons stated above, BKOH on behalf of its indicated clients, respectfully requests that

provided the average rate per subscriber is less than the rate charged to individual residential subscribers; (6) clarify how operators should treat the revenues received from off-season customers for minimal service to avoid connection and re-connection charges; (7) clarify that where no historical costs or charges are available for services or equipment to be offered in the future, the cable operators may include prospective data for purposes of establishing permitted rates in Part III of Form 393.

Respectfully submitted,

BARAFF, KOERNER, OLENDER
& HOCHBERG, P.C.

MARK J. PALCHICK

June 21, 1993

c:\CLIENT\BKOH.RCN

ATTACHMENT 1

Attachment 1

FAIRMONT CABLE TV

Statement of Rick Plunkett

1. I am president of Fairmont Cable TV, an independent cable company operating in Fairmont Minnesota since 1964.

2. We lease a non-addressable, 70 channel converter box with remote control. (The Oak Sigma 500 converter).

3. Similar products are available for purchase from local retailers, to wit:

   a. Gemini Converter, 70 channel with remote control. Price $70.00 from KMART at 1215 North State Street, Fairmont, MN 56031.

   b. Zenith model ST300v 84 channel converter with remote control. Price $130 from Bill's Radio and TV, 1255 Hwy. 15 South, Fairmont MN 56031.

4. Both retailers have reported that sales on these products are slow because my lease price of $2.00 per month is so reasonable.

5. Elaborate accounting and price control rules are not needed here where similar non-addressable converters are readily available for purchase in the area.

Dated: 6-18-93

Rick Plunkett
Fairmont Cable TV
President

P.O. Box 953 ● 924 Lake Avenue Fairmont, MN 56031 ● (507) 235-9629 ● Fax (507) 235-9638
P.O. Box 6478 ● 331 16th Avenue NW Rochester, MN 55903 ● (507) 287-0880 ● Fax (507) 288-9207

CERTIFICATE OF SERVICE

I, Bernadette T. Clark, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P.C., do hereby certify that on this 21st day of June, 1993, copies of the